

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE APPLICATION OF GTE WIRELESS OF THE	)	
MIDWEST INCORPORATED FOR ISSUANCE OF	)	
A CERTIFICATE OF PUBLIC CONVENIENCE AND	)	
NECESSITY TO CONSTRUCT A PERSONAL	)	
COMMUNICATIONS SERVICE FACILITY IN THE	)	
CINCINNATI-DAYTON MAJOR TRADING AREA	)	CASE NO. 98-308
WHICH INCLUDES BOONE, KENTON, CAMPBELL,	)	
GALLATIN, GRANT, PENDLETON, BRACKEN,	)	
MASON, LEWIS, GREENUP, CARTER, BOYD,	)	
ELLIOTT, LAWRENCE, JOHNSON, MARTIN,	)	
FLOYD AND PIKE COUNTIES, KENTUCKY	)	
(THE CVG 320 FACILITY)	)	

O R D E R

On December 2, 1998, GTE Wireless of the Midwest Incorporated ("GTE Wireless") filed a motion requesting this Commission's authorization of placement of a temporary personal communications service facility (the "Temporary Facility") at 1801 Alexandria Pike in the City of Highland Heights, Kentucky (the "City"), the proposed site of the permanent facility for which GTE Wireless has applied for a certificate of public convenience and necessity ("CPCN") in this case. In support of its motion, GTE Wireless has submitted a propagation study performed by its radio frequency engineer depicting inadequate coverage in the subject area, together with a site plan signed and sealed by a registered professional engineer. The proposed Temporary Facility is an 80 foot wooden pole which requires no permanent foundation but which will be sunk 15 feet into the ground at the site. It may be removed on short notice. GTE Wireless states that the public convenience and necessity require the immediate placement of the Temporary Facility because service to

the area is inadequate and because the proceeding on its CPCN for a permanent facility is likely to be lengthy. Due to a discovery dispute between the parties, it is at this point uncertain when a hearing on the merits of the application, which was filed on June 22, 1998, may take place. At the request of the intervenor, even the oral argument on the discovery dispute has been postponed until January 22, 1999.

The City, the intervenor herein, has filed an objection to the motion to place the Temporary Facility, arguing that additional proceedings including a hearing should take place in regard to the Temporary Facility in addition to the proceedings on the permanent facility. The City argues that it has authority under 1998 Ky. Acts Ch. 231 to conduct a regulatory review of the Temporary Facility because GTE's motion to place the facility was filed after July 15, 1998, the effective date of 1998 Ky. Acts Ch. 231. It also says there is nothing to differentiate the Temporary Facility from those facilities regarding which a bifurcated procedure of local, then Commission, review of proposed cellular or personal communications services ("PCS") towers is mandated by statute. The City asks, among other things, clarification as to whether "considerations of the public" are "relevant in the placement and erection and or construction of a 'temporary personal communications service facility.'" Finally, the City disputes GTE Wireless's contention that service in the area is inadequate, calling the argument "disingenuous" because GTE Wireless has been operating for "a long period of time." This statement, however, ignores the reality of the wireless market, which is expanding at a dizzying pace and which requires wireless carriers to expand their facilities accordingly.

This Commission has not regulated the placement of temporary facilities, which are frequently deployed by wireless carriers for testing purposes as well as in efforts to maintain service standards for an ever-growing number of customers while CPCN applications are pending. Temporary facilities are pre-built and lack permanent foundations. Their placement at a particular location is not "construction." Thus, the issue as to whether a utility may lawfully place such a facility without a CPCN, and the related issue of the extent of local control over such a facility pursuant to statutes enacted in 1996 and 1998, respectively, have not previously been directly before the Commission. Full analysis of the law and a decision as to whether Commission authorization is appropriate in this instance are therefore necessary.

With certain statutory limitations discussed below, the Commission has exclusive jurisdiction over the rates and service of utilities, KRS 278.040, and adequate service cannot be provided without adequate facilities. Accordingly, the Commission also has jurisdiction over the "facilities" of utilities. KRS 278.020; KRS 278.280. See also KRS 100.324(1) (except in cases involving construction of an "antenna tower" pursuant to KRS 100.324(5) or KRS 100.987, "public utilities operating under the jurisdiction of the Public Service Commission ... shall not be required to receive the approval of the planning unit for the location or relocation of any of their service facilities"). A utility "facility" is defined in KRS Chapter 278 as "all property, means, and instrumentalities owned, operated, leased, licensed, used, furnished, or supplied for, by, or in connection with the business of any utility." KRS 278.010(9). A "service facility" for which planning unit approval is not required is defined in KRS Chapter 100 as

all facilities of such utilities ... other than office space, garage space, and warehouse space and include office space, garage space, and warehouse space when such space is incidental to a service facility.

KRS 100.324(1).

A wireless telecommunications carrier is a "utility" under Kentucky law. Oldham County Planning and Zoning Com'n v. Courier Communications Corp., Ky. App., 722 S.W.2d 904, 906 (1987). Consequently, the Temporary Facility clearly is included in both definitions of utility "facility" above. Accordingly, it is under Commission jurisdiction. Just as clearly, unless the facility is an "antenna tower" that will be "constructed," the planning unit has no jurisdiction to approve or disapprove its location or relocation.<sup>1</sup>

The next issue to be decided is whether the placement of the Temporary Facility is "construction" requiring a CPCN. KRS 278.020(1) provides that a CPCN is required for utility construction "except ... ordinary extensions of existing systems in the usual course of business." 807 KAR 5:001, Section 9(3) defines "usual course of business" construction as [1] that which does not "create wasteful duplication of plant," does not conflict with "service of other utilities," and does not involve sufficient money to "materially affect" the utility's financial condition; or [2] that which does not result in "increased charges" to the utility's customers. It is perfectly reasonable to conclude that what is essentially a telephone pole does not materially affect a utility's financial condition; nor is it likely to

---

<sup>1</sup> In noting the general legal prohibition against planning commission jurisdiction over location of utility facilities, the Commission does not purport to conclude that a utility need not comply with other local requirements that do not include review of the location of a facility.

increase charges to customers.<sup>2</sup> Wasteful duplication of plant is not an issue; nor, in the competitive market of wireless carriers, is "conflict" with other utilities an issue. Thus, pursuant to KRS 278.020 and 807 KAR 5:001, Section 9(3), even if placement of a pre-built wooden pole were "construction," it would be construction in the usual course of business for which no CPCN would be necessary.

Because the Temporary Facility in question is to provide wireless telecommunications service, however, the inquiry cannot end there. It is also necessary to examine KRS 278.650 and 1998 Ky. Acts Ch. 231 -- statutes that apply only to PCS and cellular "antenna tower" construction -- to determine whether a CPCN must be granted by this Commission and whether the planning commission has authority to conduct a review prior to placement of the Temporary Facility. Based on the plain language of the statutes in question, the Commission concludes that placement of the Temporary Facility neither requires a CPCN nor triggers the statutory necessity of review by the registered planning commission and the PSC.

The CPCN requirement of KRS 278.650 is triggered when a utility proposes "construction of an antenna tower for cellular telecommunications services or personal communications services." The Temporary Facility will not be "constructed." It is prefabricated and will simply be delivered to the site and placed without a permanent foundation. Moreover, KRS 278.650 describes the facility it concerns as a "tower." It strains logic to characterize an 80-foot wooden telephone pole as a "tower." Had the

---

<sup>2</sup> This Commission does not regulate the charges of wireless telecommunications carriers and would not, therefore, require a CPCN on these grounds.

General Assembly concluded that local review of placement of an 80 foot wooden pole is desirable, it surely would have chosen a different term to express its intention. It also, presumably, would have mandated that the additional proceedings currently applicable to cellular and PCS "towers" apply also to other utility poles. It did not do so. It therefore does not appear to be the intent of the General Assembly that the wooden pole at issue should be subject to the provisions of law applicable to "antenna towers." Moreover, it would be discriminatory for this Commission to define the Temporary Facility at issue as a "tower," simply to impose restrictions and expenses on wireless companies when they seek to use such poles, when wooden utility poles are regularly placed by wireline telecommunications carriers in the "usual course of business" pursuant to KRS 278.020 and therefore are not subject to those restrictions and expenses. Placement of a single wooden pole by a utility is generally subject to no proceedings at all.

1998 Ky. Acts Ch. 231 does not mandate a different result. This act, effective July 15, 1998, provides for planning commission review followed by a CPCN proceeding at the Commission when a utility "proposes to construct an antenna tower for cellular telecommunications services or personal communications services." KRS 100.987. In other words, the terms that trigger formal proceedings are identical to those of KRS 278.650. The analysis is, accordingly, also identical. The Commission concludes that the law does not require a CPCN filing or other formal proceedings for placement of the Temporary Facility.

The City, in objecting to placement of the Temporary Facility, erroneously implies that the "public concern" here reaches only aesthetics and zoning issues. The "public

concern" this Commission was created to address is the need for affordable and reliable utility service. KRS 278.040. Wireless telecommunications is a utility service. KRS 278.010. GTE Wireless is a public utility, Oldham County, 722 S.W.2d at 960, whose service this Commission is mandated by statute to oversee. KRS 278.040. The "public convenience and necessity" which is the statutory touchstone for utility construction does not concern aesthetics and zoning; it concerns adequacy of service. See Kentucky Utilities Co. v. Public Service Com'n, Ky., 252 S.W.2d 885, 890 (1952) (considerations in granting a CPCN for a utility facility are adequacy of existing service, economic feasibility of the proposed facility, avoidance of wasteful duplication, and the financial condition of the applicant). See also Satterwhite v. Public Service Com'n, Ky., 474 S.W.2d 387, 388-89 (1971) (citing factors enumerated in Kentucky Utilities, supra, in holding that persons over whose land electric transmission lines would cross were not entitled to notice of, or participation in, hearing on CPCN for the transmission lines and noting that during the hearing on the CPCN the Commission was "not concerned with that detail [the specific path for the lines] because it was not relevant to the issue of convenience and necessity"); Oldham County, 722 S.W.2d at 907 ("[b]y enactment of KRS 100.324, the legislature has seen fit, for the public good, to remove public utilities from the jurisdiction of local planning commissions").

While 1998 Ky. Acts Ch. 231 provides for local review of a wireless antenna tower prior to issuance of a CPCN by the Commission, it nevertheless preserves the principle that adequacy of utility service takes precedence over zoning considerations. Aesthetics and zoning, while important considerations, are not, under Kentucky law, sufficient to

prevent a utility from providing adequate service. See KRS 100.987(5)(a) (providing that the Commission may override a planning commission rejection of a tower proposal if the *public convenience and necessity* require the construction and there is no suitable alternative site for the construction); KRS 278.650 (same).

As a final matter, the Commission notes that both it and Kentucky's planning commissions must be cognizant of the requirements of the federal Telecommunications Act of 1996 (the "Act"), a major purpose of which is to "encourage the rapid deployment of new technology through competition and reduced regulation." AT&T Communications of the South Central States, Inc. v. BellSouth Telecommunications, Inc., 20 F. Supp.2d 1097 (E.D. Ky. 1998) . Accordingly, federal law requires that decisions regarding wireless telecommunications tower applications be rendered "within a reasonable period of time after the request is duly filed." 47 U.S.C. § 332(c)(7)(B)(ii). While a "reasonable period of time" is difficult to quantify, it is clear that a proceeding lasting eight to ten months - perhaps an optimistic estimate of the length of time that will be necessary to complete this case - at least skirts the edge of reasonableness under the Act. The court in Western PCS II Corp. v. Extraterritorial Zoning Authority of the City and County of Santa Fe, 957 F. Supp. 1230, 1239 (D.N.Mex. 1997) issued mandamus relief in to a wireless carrier rather than remand a facilities siting case when the local zoning authority had "unnecessarily delay[ed]" a decision. The proceeding in Western PCS II had begun in June 1996, when the request was submitted to the preliminary review body of the zoning authority, and had concluded with a denial five months later, in September 1996. Id. at 1235. But see Illinois RSA No. 3, Inc. v. County of Peoria, 963 F. Supp. 732, 746 (C.D.Ill.



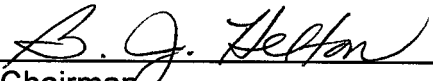
1997) (Court could not conclude that "taking six months ... is per se unreasonable," particularly since the local authority began to work on the siting petition "almost as soon as Plaintiff filed it" and since Plaintiff "did not object to several continuances"). This case is now almost six months old, and it may yet be several weeks before a hearing can be held.


Based on the foregoing, the Commission concludes that GTE Wireless is permitted by law to place its Temporary Facility without authorization either from this Commission or from the local planning commission. Instead of requesting a Commission Order, a utility wishing to place a temporary prefabricated facility that does not require a permanent foundation should notify owners of property within 500 feet of the site of its intention and notify the Commission's Executive Director, describing the type of facility to be placed and giving the location of the placement. The matter will be addressed by the Commission only if it appears that CPCN requirements or safety issues are implicated by the facility in question. The record demonstrates that no such concerns are implicated here. However, the likelihood that the CPCN proceeding will not be resolved in a reasonable period of time is of great concern to the Commission.

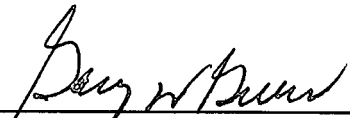
IT IS THEREFORE ORDERED that because GTE Wireless is authorized by law to place its Temporary Facility without issuance of a CPCN, no proceedings in regard to GTE Wireless' Motion will be instituted and no CPCN for placement of the Temporary Facility will be issued.

Done at Frankfort, Kentucky, this 29th day of December, 1998.

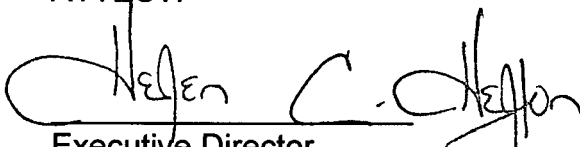
PUBLIC SERVICE COMMISSION

  
Chairman

  
Vice Chairman

  
Commissioner

ATTEST:

  
Executive Director